

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Statutory Review of The System for
Regulating Rates and Classes For Market-
Dominant Products

Docket No. RM2017-3

**REPLY COMMENTS OF THE AMERICAN POSTAL WORKERS UNION, AFL-CIO
ON THE NOTICE OF PROPOSED RULEMAKING FOR THE SYSTEM FOR
REGULATING RATES AND CLASSES FOR MARKET DOMINANT PRODUCTS**

(March 30, 2018)

Congress embarked on an experiment with our public postal services by imposing a price cap on all market dominant mail and detailing Objectives that it hoped its experiment would accomplish. Congress clearly did not intend its price cap experiment to be provisional, but it tempered its expectations as to whether the price cap would achieve the Objectives by directing the Commission to evaluate the price cap system after ten years. To that end, Congress directed that:

Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

39 U.S.C. 3622(d)(3).

The Commission's charge to review "the system" is certainly not limited to establishing or changing only procedural rules, and procedural rules will not fix the

problems the Commission has identified. The “system for regulating rates and classes” described in the PAEA includes a price cap, a schedule of regular rate changes, and procedural requirements. 39 U.S.C. § 3622 (d)(1). If the Commission’s review finds problems with any part of the system’s ability to meet the Objectives, as it has, the Commission is charged with fixing the system so that the Objectives will be met. The Commission cannot change the Objectives; but it can change the system.

The Commission took almost a year to “review the system” and is now deep into a several months’ long notice and comment period on its proposed rulemaking. While stakeholders, including APWU, disagree with the Commission about parts of the conclusions it reached in its underlying review, we cannot deny that the Commission performed its review duty under the law. Nor do most of the commentators who address the success of the system achieving all of the Objectives laid out in the PAEA meaningfully contest the Commission’s finding that the Postal Service’s financial stability is endangered, if not outright failing.¹ Having conclusively determined that there is a need to make changes to the system for regulating market-dominant products’ rates, particularly to address the Postal Service’s financial instabilities, the Commission is compelled by law to take action.

Congress decreed that the Commission pursue one of two possibilities – modify the price cap system or implement an alternative system. The Commission has chosen to do the former over the objection of the Postal Service and the internal stakeholders who know first-hand the extent of the problems attributable to the price cap. Even though

¹ E.g., National Postal Policy Council, *et al.* Comments at 3-5 (Mar. 1, 2018); Alliance of Nonprofit Mailers, *et al.* Comments at 1-2 (Mar. 1, 2018); Public Representative Comments at 3-5 (Mar. 1, 2018).

APWU believes the evidence supports creating a wholly alternative system, as Congress directed that the Commission could, we acknowledge the deference to be given to the Commission's decision to retain the price cap. Prof'l Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1221 (D.C. Cir. 1983) ("Furthermore, rulemaking is an inherently policy-oriented process and the agency must be accorded considerable deference in evaluating information presented and reaching decisions based upon its expertise.")

The Commission is faced with demands from some stakeholders to ignore its findings and leave a failing system in place. Inaction in the face of the Commission's conclusions is the opposite of what Congress expected and violates the PAEA. Congress' mandate requires that the Commission cut through the "noise" of these demands and promptly proceed with the best ideas for reforming the price cap system. The allure of doing nothing exemplifies the importance of the Commission's charge to critically assess the success of the price cap now. Some stakeholders might be content to trade the long-term degradation of the U.S. public postal system for their short-term gains; but the Commission cannot. Congress plainly foresaw the need for an objective analysis at a precise time – ten years -- by a regulator invested in the overall success of the Postal Service and universal service. The Commission is therefore obligated, under mandate by Congress, to proceed with its rulemaking and institute a final rule that gives the Postal Service rate-setting authority in addition to the current price cap.

Reply to Comments

Certain arguments for why the Commission should not follow through on its proposed rule to give the Postal Service additional rate authority through a combination

of supplemental and performance-based authority were repeated by several industry commentators. Many of these comments illustrate an eagerness to replace the Commission's balanced view of a system that serves all interests with a view and analysis of the rate system that would work best for only certain business interests. The Commission should be cautious in accepting these remarks which are often stated as truisms but without real support. We respond to some of those remarks here to lend perspective to the various considerations the Commission is balancing as it proceeds with its rulemaking. The most important takeaway from these remarks and our response is that the Commission should not delay in implementing a final version of the rules it has proposed that provides additional rate authority for the Postal Service.

- **The Commission should wait for Congress to pass comprehensive postal legislative reform.²**

A comprehensive reformation of the Postal Service's finances requires Congressional action and Commission action. Neither one alone will completely fix the PAEA framework. It is not, therefore, true that the Commission is correcting more than the rate system's failure to adequately meet the Objectives with its proposed additional rate authority; doing so still leaves other aspects of the PAEA that need to be addressed by Congress.

That said, waiting for congressional action before the Commission implements its rulemaking is misguided and directly violates the ten-year review mandate of the PAEA. Congress directed the Commission to review the rate system and make changes as needed at this particular point in time; the Commission is compelled to do so on the

² E.g., NPPC Comments at 5; American Mail Alliance Comments at 5-6 (Mar. 1, 2018); News Media Alliance Comments at 6-7 (Mar. 1, 2018).

timeline Congress set out for it, not a timeline that waits for further Congressional reforms. The Commission knows all too well that Congressional reforms are elusive and uncertain. Waiting on Congress for any more guidance than it has already given in the PAEA is of no benefit to any stakeholder and would lead the Commission to unnecessarily delay its statutory charge to review and reform the rate-setting system at this ten-year mark. *E.g. Cutler v. Hayes*, 818 F.2d 879, 896–97 (D.C. Cir. 1987) (“The agency's discretion is not unbounded, however, since the consequences of dilatoriness may be great. As we have had occasion to state, ‘[t]here must be a “rule of reason” to govern the time limit to administrative proceedings. Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans.’ Moreover, unjustifiable delay may undermine the statutory scheme and could inflict harm on individuals in need of final action.”)

Even if Congress were to make other postal reforms, Congress has already given the Commission flexibility to review “as appropriate thereafter” this initial ten-year review and reconsider the Commission’s changes based on circumstances the Commission deems impactful. This clearly could apply to statutory changes that effect the system the Commission puts into place. As it is, the Commission does not pretend that its rulemaking will be in place forever – the Commission has already planned to review its changes to the system in five years. As a practical matter, therefore, it is unnecessary to wait for Congress; whatever changes Congress might make in the future can naturally become part of the Commission’s ongoing review of the rate-setting system.

- **Rate increases decrease mail volume.³**

As Commissioner Hammond acknowledged, this is not necessarily true. (See Order No. 4258, *Dissenting Views of Commissioner Tony Hammond* at 2 (“...the exigent surcharges that were in effect from 2014 to 2016 appeared not to result in any significant volume loss.”).) The exigency increase did not appear to cause a decrease in mail volume, even though the increase was larger than the annual increases the Commission would allow under this rulemaking. In any case, even without additional rate authority, rates will increase within the price cap. It is not clear if commentators are concluding that those regular increases have no effect on mail volume. This suggests that evaluating mail volume changes only through the lens of additional rate authority fails to take into consideration all of the factors that cause declines in mail volume, such as poor service, electronic diversion, better addressing (elimination of UAA), and improved targeting (fewer mailings to fewer people). The Commission must allow the Postal Service to consider mail volume impacts comprehensively, including by allowing the Postal Service to set rates at appropriate levels based on market conditions and in response to the many factors that drive demand for postal services.

- **The Commission should take a more aggressive role in scrutinizing Postal Service costs and approving capital investments.⁴**

The Commission’s purpose is to ensure the transparency and accountability of the U.S. Postal Service. The Commission is not responsible for the strategic direction of the Postal Service; that is entrusted to the Board of Governors. Nor is the Commission responsible for the day-to-day operations of the Postal Service; that is entrusted to postal

³ E.g., NPPC Comments at 63.

⁴ E.g., NPPC Comments at 17.

management. Commentators' doubts about the Commission's authority to reform the rate system despite Congress' demand that it do so are at odds with their suggestion that the Commission imbued itself with authority to oversee postal operations. The Commission cannot give itself more authority than Congress has already decreed. Nor is there any reason to believe that the Commission – even with the help of mailers – would manage in a way that would largely eliminate rate increases. As APWU commented earlier, achieving processing and delivery efficiencies which would eventually lower costs requires capital that the Postal Service does not have and will never achieve without the ability to raise more revenue. Any postal management under any type of regulation would need and seek the ability to raise capital.

This limit on Commission involvement in postal operations also speaks to the Commission's authority to make substantive changes to the rate system. If the Commission cannot make substantive changes to the rate system, there is little purpose to the Commission reviewing the rate system in the first place. Reforming the system for regulating rates and classes for market-dominant products is the extent of the Commission's power and authority to rectify systemic failures to achieve the Objectives. The Commission has no authority from Congress to direct Postal operations. For there to be a purpose to the Commission's charge to review the rate system, being able to make modifications to the rate system and the price cap has to be the action Congress expected the Commission to take. See Aqua Prod., Inc. v. Matal, 872 F.3d 1290, 1331 (Fed. Cir. 2017) ("Where Congress has chosen to delegate rulemaking authority by regulation...the exercise of that delegated authority must be through the promulgation of regulations in order to be entitled to *Chevron* deference.").

- **Higher rates will not solve the Postal Service's financial problems, but more cost-cutting and greater productivity will.**⁵

This theory is an *ad hominin* attack against postal management unsupported by evidence or logic. Commentators make the bald assertion that the Postal Service has a plethora of costs it can trim that will have no negative impact on service and will so significantly improve the Postal Service's financial position that no supplemental rate authority is necessary.⁶ From its perspective on the inside of postal operations, APWU is certain that cuts have already impacted service and understaffing has put unsustainable burdens on many postal employees. Significant additional cuts will affect service and ultimately revenue. Nor, as we explained in our Comments, are there huge productivity gains to be realized without the ability of the Postal Service to make capital investments in its operations.

It is certainly not an evidence-based claim that financial stability can be achieved in the current climate by further cost-reductions and productivity gains. To the contrary, one commentator pointed to the Inspector General's study of international posts as support, even though the Inspector General concluded that "[i]t appears that the combination of higher prices, efficiency gains from modernization, and growing parcel volumes have helped to stabilize the posts' respective financial positions." (RARC-WP-17 *Lessons in Price Regulation from International Posts* at 1 (Feb. 8, 2017) (emphasis added).) The cycle some commentators prefer is one in which operational costs will get higher and diminish any meaningful ability for the Postal Service to make productivity

⁵ E.g., ANM Comments at 34; NPPC Comments at 15 ("We believe a better outcome is likely if all extra rate authority were conditioned on cost reductions or productivity improvements.").

⁶ See NPPC Comments at 15-16 (claiming that a bloated number of supervisors and administrative staff is among the "many other examples [of cost reductions that] abound...").

gains or sensible cuts to its costs. It is the combination of infrastructure investment and higher rates that will stabilize postal finances.

- **The Commission's review ignored critical financial components (real estate, pension/retiree health benefit fund assets, revenue from competitive products).⁷**

The Commission considered a broad range of financial components in its analysis, including specific ones suggested to it by commentators. (See Order No. 4257 at 152, 153, 157-159, 231-235, 247-249.) Commentators disagree with how the Commission treated these components, but it is ultimately the Commission's discretion and authority to decide whether and how to integrate financial components into its analysis of Postal finances and the rate system. United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) (“[T]he well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,’” and “[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer....”) (citations omitted).

- **The Postal Service will take the full amount of the Supplemental and Performance-Based Rate Authority every year.**

The Commission does not set rates, and except in how it designs the system within the authority granted it by Congress (such as its proposal to require certain rate increases for underwater products), it cannot compel the Postal Service to request any particular rate increase. The Postal Service acknowledges its desire to have the flexibility to “exercise business judgment as to market conditions and business realities” of “perceived

⁷ E.g., NPPC Comments at 55.

demand risks or other business reasons” in setting rates in any particular year. (USPS Comments at 132.) Giving the Postal Service supplemental rate authority today is not a guarantee of a specific rate increase next year. The rate process ensures advance information to mailers about future rate increases, and the Commission can apply its own judgment of the effect market conditions have on rate increases through the Annual Compliance Review. But the numerous complaints about unaffordable rate hikes is pure hyperbole that does not countenance against giving the Postal Service additional rate authority to use as is appropriate.

- **The Commission’s proposed rule is incompatible with Objective 1.⁸**

The Commission necessarily assessed and balanced all of the Objectives in coming to its ultimate conclusion that the system has not succeeded in achieving each one of them. The PAEA does not mandate the relative weight to be given to each Objective, and the Commission found that some Objectives had been achieved. But financial stability of the Postal Service is, among all of the Objectives, the *sine qua non* of a viable postal system. When a critical Objective such as financial stability has not been achieved by almost any meaningful measure, it is within the Commission’s discretion to give it greater prominence in the rulemaking, even if it is at the perceived disadvantage of another Objective.

Commentators complain specifically that Objective 1⁹ has been jettisoned in favor of Objective 5.¹⁰ To the contrary, the Commission found that Objective 1 has been largely accomplished, certainly far more so than Objective 5. Commentators may disagree, but the Commission has a sound record upon which to reach this conclusion. Moreover, the Commission built into its proposed rules some components of Objective 1, specifically using Total Factor Productivity as the benchmark for part of the performance-based authority it proposes. Commentators may disagree with this method of how the Commission captured Objective 1 in its proposed revisions to the rate system, and APWU disagrees that using TFP is appropriate or necessary at all, but it is clear that the Commission is considering ways to foster both Objectives. That is as much as the Commission is required to do, to find an appropriate balance between Objectives. Given the overall necessity of financial sustainability to maintain the system as a whole, as well as the necessity of achieving Objective 5 in order to continue to achieve Objective 1, there is no error in the Commission giving priority to Objective 5 in its modification of the rate system. If this ultimately means that the Commission decides not to make changes that specifically reference or speak to Objective 1, that is well within its discretion. In the long-term, all of the Objectives are met if the Postal Service is financially stable.

⁹ Objective 1 is “To maximize incentives to reduce costs and increase efficiency.” 39 U.S.C. § 3622 (b) (1).

¹⁰ Objective 5 is “To assure adequate revenues, including retained earnings, to maintain financial stability.” 39 U.S.C. § 3622 (b) (5).

Conclusion

Given the failings of the system the Commission identified in its review, it would be a dereliction of the Commission's statutory charge to do little or nothing to reform the rate system for market-dominant products. By implementing its rulemaking now and giving the Postal Service additional rate authority on top of the price cap, the Commission is fulfilling not only its statutory charge, but also its mission to foster a vital and effective universal mail system. Conversely, inaction or tepid changes by the Commission will hasten declines in service and postal finances. As APWU noted in its Comments, nothing less than the supplemental and performance-based rate authority the Commission has proposed is defensible. The Commission should proceed with its proposal to give the Postal Service more pricing flexibility which will allow it to restore service while balancing the concerns expressed by mailers in these proceedings.

Respectfully submitted,

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